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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1069

ASSOCIATED ENTERPRISES, INC. and
JOHNSTON FUEL LINERS,

Appellants,

VS.

TOLTEC WATERSHED IMPROVEMENT
DISTRICT,

Appellee.

APPEAL FROM THE SUPREME COURT OF WYOMING

BRIEF OF APPELLEE

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SUMMARY OF ARGUMENT

1. A state may pass legislation classifying persons and objects for voting purposes if the classification is reasonable and natural considering the purpose of the legislation. The courts must look to the affect and not the form of the classification. A statutary discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

The res.riction of the voting franchise to property owners is reasonable and natural considering that the primary purpose of the legislation is to furnish irrigation water to their land.

If this were a "popular election" with the universal re-

quirements for voters of citizenship and residency then Appellants could not vote because they are corporations.

2. The one man—one vote rule does not apply here because non-property owners do not have "a stake equal" to property owners in the benefits to be derived nor in the costs.

None of the cases cited by Appellants apply because a watershed district does not, by any stretch of the imagination, exercise general governmental powers nor does it have an affect on the resident population that a school district or a bond issue for sewers, etc. would have. The interests of the non-property owners in the function of the district is nonexistent or slight.

The group characteristics of the property owners bears a valid relation to the interest of the group in the subject matter of the election.

Appellants, as corporations, have no standing to sue under the protection of the Fourteenth Amendment or the one man—one vote cases cited.

A watershed district is a quasi-public corporation not a governmental unit in the strictest sense.

The very fact that one of the Appellant corporations is legally allowed to vote in the watershed elections removes those elections from consideration under the one man—one vote doctrine.

THE LIMITING OF A VOTING FRANCHISE TO PROPERTY OWNERS IS AN UNREASONABLE, ARBITRARY AND CAPRICIOUS CLASSIFICATION

Appellants do not argue that classifications cannot be made. Indeed they say that "It is well settled that a state

may classify persons and objects for the purpose of legislation and pass laws applicable only to persons or objects within a designated class. . . .The state has a right to make reasonable classifications and to make voting conditions upon which voting may be exercised." (Appellants' Brief page 13.)

Appellants go on to argue that the classification must be reasonable and natural and must have a rational basis and that mere classification itself does not deprive a group of equal protection. (Appellants' Brief page 14.) And they quote the following case in support.

> *LUDWIG v. HARTSON (Wyo. 1948) 197 P2d. 252, page 257 the Wyoming Supreme Court said:*
>
> "A classification must be reasonable in view of the objects sought to be accomplished. The discrimination must rest upon some reasonable ground of difference between the persons or things included and those excluded, having regard to the purpose of the legislation and within the sphere of its operation the statute must affect all persons similarly affected."

From a practical standpoint the object here sought to be accomplished by the organization of a watershed district is primarily to put surplus water to a beneficial use. The reasonable ground of difference between the persons or things included and those excluded could not have been made on a more rational basis than it was when the legislature differentiated between land owners and non-land owners. The land owners are the only people who benefit primarily and directly from the utilization of the water and they are the only ones who must pay for it.

16 Am. Jur. 2d. at pages 859—861 states as follows:

"The rule is well stated that a state may classify persons and objects for the purpose of legislation and pass laws applicable only to persons or objects within a designated class, for the purpose of obtaining revenue, applying the police power, strictly so-called, or increasing the industries of the state, *developing its resources*, or adding to its wealth and prosperity. . . ." (Emphasis supplied)

"It is class legislation, discriminating against some and for others, that is prohibited by the equal protection guarantee. The guarantee does not intend to take from the states the right and power to classify the subjects of legislation. It does not prohibit or prevent classification, provided such classification of persons and things is reasonable for the purpose of legislation, is based on proper and justifiable distinction, considering the purpose of the law, is not clearly arbitrary, and is not a subtrifuge to shield one class or unduly to burden another or to oppress unlawfully in its administration. . . . The Constitution does not require situations which are different in fact or opinion to be treated in law as though they were the same."

And 16 Am. Jur. 2d. at pages 865—866 states:

"In the determination of the legality of the classification for legislative regulation, the subject to be regulated, the character, extent, and purpose of the regulation, the classes of persons legally and naturally affected by the regulation, and the particular classification and regulation adopted by the statute should be considered. Difficulty is often experienced in determining

> whether all those belonging to the classes legally and naturally affected by the regulation are included in the classification made or whether any are illegally excluded from the particular classification adopted by the statute. The inquiry should be whether the distinctive characteristics upon which it is proposed to found different treatment are such as in the nature of things will denote in some reasonable degree a practical and real basis for discrimination. The courts must look to the affect and not to the form of the classification."

For the Appellants to argue that a tenant at sufferance and their employees are as equally concerned with the construction of a water storage project as the actual land owners is unrealistic. The United States Supreme Court stated in the case of WILLIAMS v. RHODES 393 U.S. 23, 21 L.Ed. 2d 24, 89 S.Ct. 5, in 21 L.Ed. 2d at page 31 as follows:

> "It is true that this court has firmly established the principle that the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitution. But we have also held many times that "indivious" distinctions cannot be enacted without a violation of the Equal Protection Clause. In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interest which the state claims to be protecting, and the interests of those who are disadvantaged by the classification."

In McGowan v. Maryland, 336 U.S. 420, 425, 81 S.Ct. 1101, 1105, 6 L.Ed. 2d. 339, 399 (1961) Mr. Chief Justice Warren wrote:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The Constitutional safeguard is offended only if the classification rests on ground wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

And at page 1188 in the same case, Mr. Justice Frankfurter said:

> "Neither the Due Process nor the Equal Protection Clause demands logical tidiness. * * * * No finicky or exact conformity to abstract correlation is required of legislation. The Constitution is satisfied if a legislature responds to the practical living facts with which it deals. Through what precise points in a field of many competing pressures a legislature might most suitably have drawn its lines is not a question for judicial examination. It is enough to satisfy the Constitution that in drawing them the principle of reason has not been disregarded."

Under Appellants contention the opportunities for fraud on the part of a land owner who would be opposed to the formation of a watershed district would be almost unlimited. All they would have to do is lease portions of their land, without even a written commitment, to enough so-called lessees so that a majority in number could defeat

all of the surrounding land owners. The same thing could be done by hiring an excess of employees just prior to election.

The facts and circumstances behind the watershed law are clear. In Wyoming we have a particular urgency in attempting to apply our surplus waters to beneficial use before they are claimed by other states. The federal government has enacted legislation which allows Congress to appropriate grants to aid in the construction of these projects. The federal government has also made provisions for loans by the Farmers Home Administration to the particular projects to make up the balance of the cost. The bonds provided for in the act are the security for these loans. The watershed law was enacted in order to take advantage of these congressional programs.

If the requirements had been set forth as they are in all popular elections and the voting franchise had been limited to citizens who were legal residents of the watershed district, the voting classification would have been unreasonable, arbitrary and capricious. It would then have excluded non-resident land owners of all kinds, together with firms and corporations which owned land and maintained their principle offices within the districts.

This would have been clearly unconstitutional because it is the fact of owning land which is affected by the formation and operation of a watershed district that is the subject of all the various elections provided for in the act. The land owners then excluded would be substantially more affected than residents of the district who didn't own land.

In this particular case the watershed district is actually formed by the local soil conservation district after a referendum of the people most affected by it. (W.S. 1957—41-354.10, Appellants' Brief A-62)

25 Am. Jur. 2d. at page 245 states:

> "Though the legislature may create a drainage district or project by direct action, it is not required to do so. It may also by general law provide for the formation of a district by a subordinate agency, in a proceeding instituted for such purpose. This authority is commonly vested either in a court of general jurisdiction, or in a county legislative or administrative body, such as the Board of County Commissioners or Supervisors, or a board of drainage commissioners created for the purpose. The designation of a court to decide the issues is held not objectionable as a delegation of legislative powers to the judiciary, so long as the court is limited to determining the existence of the conditions precedent and is afforded no opportunity to exercise its discretion."

25 Am. Jur. 2d. at page 249 states:

> "In some jurisdictions the tribunal or body is required to investigate the feasibility and desirability of the project through a subordinate agency of one kind or another, and cannot decide the issue until a favorable report has been returned. In a few states the question is required to be submitted to a vote of the persons owning real property within the area that will be subjected to assessment or within the limits of the district to be formed."

In our particular case the subordinate agency is the Laramie River Soil and Water Conservation District and it is required that the issue be submitted to a vote of persons owning real property within the limits of the district to be formed.

THE WEIGHTING OF THE VOTES BY A MAJORITY OF THE ACREAGE IS A DEBASEMENT OF THE VOTES OF THE SMALLER PROPERTY OWNERS AND IS VIOLATIVE OF THE ONE MAN—ONE VOTE RULE.

Appellants quote a series of recent cases from this court. AVERY v. MIDLAND COUNTY, TEXAS, 390 U.S. 474, 20 L.Ed. 2d. 52: But the holding in that case was that since the commissioners court was a unit of local government *having general governmental powers* over the county's entire geographical area, it was subject to the "one man—one vote" rule and the constitution did not permit its members to be apportioned among the single member districts of substantially unequal population. And the case of GRAY v. SANDERS 372 U.S. 368, 83 S. Ct. 801, 9 L.Ed. 2d. 821 held that every voter was equal to every other voter when he cast his ballot *in a state wide election*. The case of EVANS v. CORNMAN, 90 S.Ct. 1752, 26 L.Ed. 2d. 370, held that people living in a federal enclave in Maryland could not be excluded from voting in Maryland elections due to the fact that they had a stake equal to that of other Maryland residents in nearly every election.

Here it cannot be said that the non-land owners have "a stake equal" to land owners in a watershed district. The question here is who benefits and who pays? In the other Supreme Court cases regarding bond elections there was never any question but that the non-property owners benefited substantially as much as the property owners even though the property owners were the only ones who paid.

The applicability of the "one man—one vote" rule is discussed in an annotation in 18 L.Ed. 2d. 1532 at page 1541 where, under the topic of governing bodies of limited-

purpose districts, it was held that the "one man—one vote" rule does not apply to local purpose districts including school boards. Particularly in light of SAILERS v. BOARD OF EDUCATION, 387 U.S. 105, 87 S.Ct. 1549.

The case of HADLY v. JUNIOR COLLEGE DISTRICT OF METROPOLITAN KANSAS CITY, U.S. 90, S.Ct. 790, 25 L.Ed. 2d. 45 (1970) did extend the one man —one vote rule to local school districts. Appellants quote at length from the dissenting opinion of Justice HARLAN. However, the quotations may be out of context. The general tenor of Justice HARLAN'S dissent is one of concern that the court has gone too far in extending the rule in this particular case and he's afraid that it may be even extended far enough down the scale of governmental bodies so that it includes irrigation districts and air pollution control agencies. However, he goes on to say in 90 S. Ct. page 798:

> "In my opinion, this ruling imposes an arbitrary limitation on the ways in which local agencies may be constituted. The court concedes that the States may use means other than apportionment "to insure that legitimate political goals of representation are achieved." For example, officials elected at large may be required to be residents of particular areas that do not contain equal number of people. . . . ; *the right to vote may be denied outright to persons whose interests in the function performed by the agency is nonexistent or slight*. . . . Since the court recognizes the State's need for flexibility in structuring local units, I am unable to see any basis for its selectively denying to them one of the means to achieve such flexibility. If, as the court speculates, other means will prove as effective as

apportionment in adaptation of local agencies to meet specific needs. . . . " (Emphasis supplied)

And Mr. Chief Justice BURGER dissents as follows in 90 S. Ct. page 802:

"I concur fully in the opinion of Mr. Justice HARLAN. I add this comment to emphasize the subjective quality of a doctrine of constitutional law that has as its primary standard "as general rule, that when ever a state or local government decides to select persons by popular election. . . ." the constitution commands that each qualified voter must be given a vote which is equally weighted with the votes cast by all other electors.

The failure to provide guidelines for determining when the courts "general rule" is to be applied is exacerbated when the court implies that the stringent standards of "mathematical exactitude" that are controlling in apportionment of federal congressional districts need not be applied to smaller specialized districts such as the Junior College District in this case. *This gives added relevance to Mr. Justice HARLAN'S observation that "the need for more flexibility becomes greater as we proceed down the spectrum from the state legislature to the single-purpose local* entity.". . . yet the court has given almost no indication of which non-population interests may or may not legitimately be considered by a legislature in devising a constitutional apportionment scheme for a local specialized unit of government.

Ultimately, only this court can finally apply these "general rules" but in the interim all other

> judges must speculate as best they can when and how to apply them. With all deference I suggest the court's opinion today fails to give any meaningful guidelines." (Emphasis supplied)

The HADLY case taken alone would extend the one man—one vote rule somewhat farther down the spectrum of governmental units than the court had previously held, however, it can still be distinguished on the basis that school districts hold more general interest for all of the voters than would a watershed improvement district. One of the foundation stones of our nation is based on the concept that the education of our young is of direct benefit to all of society.

It is interesting to note that all of the cases which Appellants rely upon concern elections involving units of government exercising general governmental powers, school districts or bond elections concerned with local improvements which all the residents may use. In every instance there could be no agument that the citizens whose voting franchise was denied were directly connected with the benefits of the election if not with the costs. To say that a ranch employee or anyone else merely living in a watershed district should be allowed to vote because he's interested in the environment or the fishing is rather ridiculous.

It should also be pointed out that the Appellants, two corporations, would not have been allowed to vote in a single one of the elections contained in their cited cases. Only citizens who were residents and not artificial entities were qualified.

25 Am. Jur. 2d at page 721 said:

> "Persons qualified to vote for members of a state legislature have standing to maintain an

> action brought in a Federal District Court for a declaration that a state apportionment act is unconstitutional under the Fourteenth Amendment and for an injunction restraining defendants from conducting any further elections under the act. In fact, it is only a legal voter whose rights are impinged who may maintain such an action. It has been held that a state has no legal capacity to maintain such an action in federal court, for a state is not a person within the scope of protection of the Fourteenth Amendment. And a state league of municipalities and a state labor association, not being qualified voters, have been held ineligible to maintain such an action.

This court held in GORDAN v. LANCE, 403 U.S. 1, 29 L.Ed. 2d. 273, 91 S. Ct. 1889 at page 1891:

> "We conclude that the West Virginia Court's reliance on the Gray and Cipriano cases was misplaced. The defect this court found in those cases lay in the denial or dilution of voting power because of group characteristics—*geographic location and property ownership—that bore no valid relation to the interest of those groups in the subject matter of the election;*" moreover, the dilution or denial was imposed irrespective of how members of those groups actually voted. . . ."

There could not be a more valid relationship to the interest of those groups in the subject matter of the election than we have here. Appellants argue that lessees who make their living from the land have a more direct interest than absentee property owners. We fail to see the connection in the instant case when Appellant, Johnston Fuel Liners, is a very successful trucking company.

Actually a watershed district, by supplying more water for irrigation purposes and preventing flood damages, enhances the desirability and value of the lease. We can't imagine that the owners of the property, whose costs are increased, would not take this into account when a new lease is negotiated. This becomes a weighing of interests between landlord and tenant. Is the improvement worth the extra rent? It's a matter of private contract. Surely Appellants are not suggesting that lessee and landlord, neither of whom are residents within the district should both have a vote. This would be discrimination against all the other landowners and would unconstitutionally weigh the votes in favor of leasing.

The court goes on to say in the GORDAN case, supra,

> "Thus in Gray, supra at 381 n. 12, we held that the county-unit system would have been defective even if unit votes were allocated strictly in proportion to population. We noted that if a candidate received 60% of the votes cast in a particular county he would receive that county's entire unit vote, the 40% cast for the other candidates being discarded. *The defect, however, continued to be geographic discrimination.* The votes for the losing candidate were discarded solely because of the county where the votes were cast. Indeed votes for the winning candidate in a county were likewise devalued, because all marginal votes for him would be discarded and would have no impact on the state wide total.
>
> Cipriano was no more than a reassertion of the principle, consistantly recognized, that an individual may not be denied access to the ballot because of some extraneous condition, such as

race, . . . wealth, . . . tax status, . . . or military status." (Emphasis supplied)

And in the GORDAN case, supra at page 1892:

"But there is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue. On the contrary, while we have recognized that state officials are normally chosen by the vote of the majority of the electorate, we have found no constitutional barrier to the selection of a governor by a state legislature, after no candidate received a majority of the popular vote. . . .

The Federal Constitution itself provides that a simple majority is insufficient on some issues; the provisions on impeachment and ratification of treaties are but two examples. Moreover, the Bill of Rights removes entire areas of legislation from the concept of majoritarian supremacy. The constitutions of many States prohibit or severely limit the power of the legislature to levy new taxes or create or increase bonded indebtedness thereby insulating entire areas from majority control. Whether these matters of finance and taxation are to be considered as less "important" than matters of treaties, foreign policy or impeachment of public officers is more properly left to the determination by the States and the people than to the courts operating under the broad mandate of the Fourteenth Amendment. . . .

That the bond issue may have the desirable objective of providing better education for future generations goes to the wisdom of all indebted-

ness limitation: it does not alter the basic fact that the balancing of interests is one for the State to resolve." (Emphasis supplied)

From the practical viewpoint watershed districts and irrigation districts in Wyoming could not operate if the one man—one vote rule were to be applied to them. If every employee, resident, lessee, or tenant at sufferance were to be allowed to vote, it would be impossible for the farmers and ranchers who actually own the land to govern the affairs of the district in which they, alone, are primarily interested.

Appellants argue that a watershed district is a governmental subdivision, (Appellants' Brief page 44) because it has the power of eminant domain. If this were so then every public utility must also be a governmental subdivision.

A watershed district is more in the nature of a quasi-public corporation as shown in 18 Am. Jur. 2d. 555:

> "A quasi-public corporation may be said to be a private corporation which has been given certain power of a public nature—such as the power of eminant domain—in order to enable it to discharge its duties for the public benefit, in which respect it differs from an ordinary private corporation, the powers of which are given and exercised exclusively for the profit or advantage of its stockholders. Such corporations are not, however, public corporations."

A private corporation would not have the resources available to complete a large watershed project nor would it qualify for federal aid under the existing programs.

> "A public service or quasi-public corporation is one private in its ownership, but having an appro-

priate franchise from the state to provide for necessity or convenience of the general public incapable of being furnished by private competitive business and dependent for its exercise on eminant domain or governmental agency. Atty. Gen. vs. Haverhill Gaslight Co. 215 Mass. 394, 101 NE 1061."

The various statutes concerning elections in the watershed law contain different criteria for passage of the issue.

Wyoming Statutes, 1957:

Section 41—354.10 concerning the referendum for formation of the district requires a majority vote of the landowners and that majority must represent a majority of the land in the district. (Appellants' Brief A-61-62)

Section 41—354.12 specifies that only a majority of the landowners voting are required and no land is involved. (A-65-67)

Section 41—354.14 (D) states that a ⅔ vote of the landowners representing a majority of the land must affirm before bonds may be issued. (A -69)

Section 41—354.24 requires a simple majority vote to discontinue the district. (A-77-78)

The requirements concerning acreage apply only to the two crucial elections, the first to form a district and the second to incur indebtedness which will be a lien on the land.

Considering, as we must, the purpose of the legislation, it could not have been done more fairly or with more even justice. There can be no "tyranny of the majority". A group of

small landowners could not force a smaller group of large landowners to develop an expensive project because the affirmative votes must represent a majority of the land. The economic burdens of a watershed system are quite high and unless it is really thought to be beneficial it cannot be forced through.

Conversely one or two large landowners, who would benefit the most, cannot force a large number of their smaller neighbors into a project which might ruin them. At least a majority vote of the landowners is always required.

Appellants don't want a so-called "popular election". If the qualifications were changed to fit the usual ones of resident citizens, etc., they wouldn't be allowed to vote at all.

If nothing else distinguishes and exempts the elections provided for in the Wyoming Watershed law from all the cases handed down by this court involving the one man—one vote rule, the very fact that Associated Enterprises, Inc., a Wyoming corporation, is allowed to vote should do it. This is not a "popular election". But it is one admirably designed to fit the purposes of the legislation. It would be patently unfair not to allow a corporate landowner a voice in something which so directly affects its interests.

Again considering the purpose of the legislation, a more just system could not be devised.

CONCLUSION

The statutes under which Appellee was organized are constitutional.

The Wyoming legislature has the power to make reasonable classifications of voters considering the purpose and function of the legislation.

If the same voter qualifications were specified here as

they were in all of the cases cited by Appellants, i.e. citizenship and residency, then Appellant, Associated Enterprises, Inc., would not have been allowed to vote. The system devised by the act in question is much more fair and just, considering the purpose of the law, than the usual voter qualifications.

A watershed district is a quasi-public corporation which does not affect the broad resident population of the district and therefore should not be subject to the one man—one vote doctrine. Its functions are propriatory and not governmental.

The decision of the Wyoming Supreme Court should be sustained.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, FRED W. PHIFER, Attorney for Appellee in the above entitled and numbered cause, hereby certify that on the day of August, 1972 I served three true and correct copies of Brief of Appellee by placing the same in the United States mail, postage prepaid at Wheatland, Wyoming, correctly addressed to:

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